**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| JEAN E. TROST, R.N.,<br><br>Appellant,<br><br>v.<br><br>AESTHETIC LITETOUCH, INC., P.S., a Washington corporation; JOHN PAUL ISBELL, M.D., Officer/Medical Director, Aesthetic Litetouch, Inc.; MELISSA ISBELL, Office Manager, Aesthetic Litetouch, Inc.; and JAMES E. FINNEGAN, Co-Owner/Manager, Aesthetic Litetouch, Inc.,<br><br>Respondents,<br><br>BELLA TU, INC., a Washington corporation, and ALAN G. WARNER, a married man, and his marital community,<br><br>Appellants. | ) | DIVISION ONE<br><br>No. 61956-0-I<br>(Consolidated with No. 62256-1-I and No. 62257-9-I)<br><br>UNPUBLISHED OPINION<br><br>FILED: July 6, 2009 |

Dwyer, A.C.J. — Jean Trost, Bella Tu, Inc., and Alan Warner appeal from the judgment entered in an action primarily involving cross-claims for infringement of Trost's right of publicity and misappropriation of trade secrets of Aesthetic Litetouch, Inc., P.S., Trost's former employer. Although we affirm the majority of the trial court's rulings, we hold that it erred in ruling both on Warner's individual liability for misappropriation of trade secrets and on Trost's claim for unpaid wages. We reverse the judgment on these two issues and

remand the case to the trial court for further proceedings. We affirm in all other respects.

I

In 1999, Dr. John Paul Isbell and Dr. Kent Burk formed Aesthetic Litetouch, Inc., P.S., (ALT) a high-end, cosmetic skincare medical practice. They hired Jean E. Trost, an experienced registered nurse, to run the practice and treat ALT's patients. Trost did so for six years, largely without the doctors' day-to-day involvement. At all times, however, Trost worked under the supervision of either Dr. Isbell or Dr. Burk, as they were ALT's medical directors. Trost also appeared in various advertisements for ALT, including those published in telephone directories. Trost never held an ownership interest in ALT; she was a salaried employee. The parties dispute whether Trost was promised a commission in addition to her salary.

In early August 2005, Trost attempted to negotiate an increase in her salary and obtain a controlling interest in ALT from Dr. Isbell, who was by then the sole owner of the practice. She informed Dr. Isbell that one of ALT's competitors, which turned out to be Bella Tu, Inc., had offered her a 50 percent ownership stake and a higher salary than she was earning at ALT. On Friday, August 12, Dr. Isbell formally rejected Trost's demand and effectively terminated her employment. Dr. Isbell permitted Trost to maintain her access to ALT's office so that she could remove her personal belongings. He further informed

her that she was "not to take any patient records or copy down any patient information on a chart." Over the ensuing weekend, however, Trost destroyed templates for patient forms that she had created for ALT's use and which were on file at ALT's office. She also gathered computer discs containing lists of patient contact information and treatment histories.

The following Monday, August 15, Dr. Isbell confronted Trost about the missing templates in a meeting that Trost's then-fiancée, Alan Warner, also attended.[1] Trost refused to return the templates. Dr. Isbell testified that, after Trost refused to restore the form templates, he turned to Warner and said, "Alan, it's—when you're an employee and you create something for a company in which you're employed, those are not your personal items. Those belong to the company." Dr. Isbell was apparently unaware that Trost also had the patient lists.

By the end of August 2005, Trost had begun overseeing operations and treating patients at Bella Tu. In September 2005, Trost used ALT's patient lists to solicit business from individuals who had previously received treatment at ALT. Over the course of the next 16 months, 145 of these patients received treatment at Bella Tu, producing revenues in excess of $119,000.

As Bella Tu's business grew, ALT's revenues shrank. ALT's troubles continued even after ALT and James Finnegan, LLC, formed a partnership for

[1] Warner and Trost married at some point after this meeting. Warner, who is an attorney, represents Trost, Bella Tu, and himself in this case.

the latter to manage ALT's operations. As a result of the declining revenues, ALT ceased operations in the fall of 2006.

Before ALT closed, however, Trost filed a complaint in March 2006 against "Aesthetic Litetouch, Inc., a Washington corporation," as well as Dr. Isbell, Melissa Isbell, and James Finnegan, the principal shareholder of James Finnegan, LLC, all in their capacity as officers of ALT. She brought 19 causes of action arising out of ALT's alleged infringement of her statutory and common law rights of publicity. (After she left ALT, Trost's name and picture continued to appear in some of ALT's advertisements, including telephone directory advertisements that had been placed and approved by Trost when she was still employed by ALT.) ALT subsequently counterclaimed against Trost, Bella Tu, and Warner, alleging that they had misappropriated ALT's trade secrets in the form of its patient lists.[2]

The trial court subsequently granted several dispositive pretrial motions in favor of ALT, the Isbells, and Finnegan. It ruled on summary judgment that Trost, Bella Tu, and Warner were liable for misappropriation of ALT's trade secrets, leaving the question of damages for the jury's determination. The trial court also dismissed Trost's claims against the individual defendants and allowed ALT to amend the case caption to reflect its status as a professional service corporation.

[2] For simplicity, we refer to Trost, Bella Tu, and Warner collectively as "Trost," unless an issue pertains to only one or two of these parties.

A significant focus of discovery concerned Bella Tu's disclosure of those ALT patients Trost had solicited and the amount of revenue Bella Tu had earned as a result of Trost's marketing email using ALT's patient list. Trost repeatedly failed to produce financial records that ALT had requested, despite multiple orders from the trial court compelling Trost to do so. Finally, months after ALT initially requested the documents and well after the deadline for the disclosure of expert witness reports, Trost provided financial records.

Discovery-related problems then led to disputes over the parties' expert witnesses. In response to Trost's objection that ALT had failed to timely disclose its economic expert's report, the trial court admitted the testimony of ALT's expert, ruling that it was Trost's dilatory behavior that caused ALT's delay. ALT sought to exclude two witnesses that Trost listed as financial experts on the ground that Trost never submitted reports for either witness. Although Trost initially argued that her tardiness was due to ALT's delay in disclosing its expert's report, at a subsequent hearing, she stipulated to limitations on the witnesses' testimony.

The jury found in favor of ALT on all of its claims. It found that Trost's misappropriation of trade secrets was willful and malicious and awarded ALT $305,000 in compensatory damages for future lost profits and $119,000 on ALT's claim for unjust enrichment. The jury also found that ALT had infringed Trost's right of publicity, but it did not find that Trost had thereby suffered any

compensable injury. After the trial concluded, the parties agreed to have the trial court adjudicate Trost's claim against ALT for unpaid wages, which Trost had failed to raise in a timely manner before trial. The trial court found that Dr. Isbell had promised to pay Trost 15 percent of ALT's profits and subsequently awarded Trost $17,246.20 to be offset against ALT's recovery. The trial court also awarded Trost $1,500 in statutory damages for each of the nine instances of infringement of her publicity right, a total of $13,500, also to be offset against ALT's award. It declined, however, to increase this amount, noting that the jury did not find that Trost had suffered any compensable injury. With the offsets, ALT's net damages award came to $393,253.80. The trial court also awarded each side attorney fees, offsetting ALT's fee award with those fees awarded to Trost.

II

Trost first contends that the trial court erred by treating ALT as a professional service corporation, allowing ALT to amend the case caption to reflect its corporate status, and dismissing her claims against the individual defendants. We disagree.

The Professional Service Corporation Act, chapter 18.100 RCW, provides for the creation of business entities, known as professional service corporations, to render healthcare services. RCW 18.100.050(1). The abbreviations P.C. or P.S. are used to distinguish a professional corporation from other business

entities. RCW 18.100.030 (1), (2). The record is replete with evidence that ALT operated as a professional service corporation. That ALT did not clarify its status when filing its counterclaim is attributable to the original error in the caption of Trost's complaint. Further, it does not matter that ALT entered into a partnership with James Finnegan, LLC, as the remedy for such arrangements, if not authorized by law, is for the court to leave the parties to that arrangement where they are found. Morelli v. Ehsan, 110 Wn.2d 555, 562, 756 P.2d 129 (1988) (citing Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn.2d 630, 637, 409 P.2d 160 (1965); Hederman v. George, 35 Wn.2d 357, 361, 212 P.2d 841 (1949)). Accordingly, the trial court correctly treated ALT as a professional service corporation.

In light of ALT's corporate status, the trial court properly allowed ALT to amend the case caption. Pursuant to CR 15, amendment of the case caption to reflect the true identity of a party is allowable when doing so will not result in prejudice to another party. Prof'l Marine Co. v. Certain Underwriters at Lloyd's, London, 118 Wn. App. 694, 705, 77 P.3d 658 (2003) (citing In re Marriage of Morrison, 26 Wn. App. 571, 573–74, 613 P.2d 557 (1980)). Here, the amendment to the case caption ensured that the correct entity was listed as a party to this suit. Trost remained able to proceed on her claims and faced no additional liability as a result of the amendment.

The trial court's dismissal of Trost's claims against the individual

defendants was also proper. Trost does not contend that the individual defendants infringed her rights of publicity for personal gain. Thus, their actions on behalf of ALT and James Finnegan, LLC, do not fall within the narrow set of circumstances under which "corporate officers may face personal liability for tortious conduct other than by piercing the corporate veil." Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 84, 18 P.3d 1144 (2001) (citing Dodson v. Econ. Equip. Co., 188 Wash. 340, 343, 62 P.2d 708 (1936); Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 753, 489 P.2d 923 (1971)). There was no error.

III

The next question is whether the trial court erred by granting summary judgment against Trost and Bella Tu on ALT's trade secrets claim. It did not.

On appeal from summary judgment, we engage "in the same inquiry as the trial court, construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact." Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 857, 851 P.2d 716 (1993), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995).

Pursuant to the Uniform Trade Secrets Act, chapter 19.108 RCW, a compilation of information is a protected trade secret if it derives independent economic value by not being known by others who could benefit from it, and if it is subject to reasonable efforts to maintain secrecy. RCW 19.108.010(4)[3]; see also Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 442, 971 P.2d 936 (1999). Trost does not dispute that the patient lists at issue constitute a compilation of information. Rather, she contends that the other two criteria—the information's economic value and reasonable efforts to maintain secrecy—are not satisfied.

[3] RCW 19.108.010(4) provides, in relevant part:

> "Trade secret" means information, including a . . . compilation . . . that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Both Trost's deposition testimony and her complaint belie her assertion that the patient lists are not valuable. Trost testified in her deposition that cosmetic skincare practices compete for the same patients and that the information contained in ALT's patient lists were specifically valuable to Bella Tu for marketing purposes. As Trost put it: "Well, of course, you know, as anyone in our business, we would love to have that information [compiled in ALT's patient list] so we could focus our targeting—our advertising better." In her complaint, Trost characterized Bella Tu as a direct competitor of ALT's. Indeed, as a result of soliciting business from individuals who had previously received treatment at ALT, Bella Tu earned approximately $119,000 in revenues. Thus, there is no genuine issue of material fact as to whether ALT's patient lists constituted a valuable compilation of information.

A review of the record also reveals that there is no genuine issue of material fact as to whether ALT took reasonable steps to secure the information on its patient lists. As both parties point out, the patient information contained on the list is protected by various privacy statutes and is therefore private in nature. Trost also confirmed in her deposition that Dr. Isbell told her on her last full day of employment "not to take any patient records or copy down any patient information on a chart" and that she agreed not to do so. Her argument that she complied with Dr. Isbell's instructions because she already possessed some of the patient lists before her employment ended is absurd. Based on the evidence

in the record, ALT took reasonable steps to maintain the secrecy of the information contained in the patient lists.

Having concluded that the patient lists are protected trade secrets, we must next determine whether Trost and Bella Tu misappropriated the information contained therein. Pursuant to the Uniform Trade Secrets Act, misappropriation includes:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
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> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
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> (i) Used improper means to acquire knowledge of the trade secret; or
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> (ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

RCW 19.108.010(2). "Person" includes a corporate entity. RCW 19.108.010(3).

Based on the evidence in the record, there is no issue of material fact as to whether Trost and Bella Tu improperly acquired and disclosed the information contained in ALT's patient lists. In blatant disregard of Dr. Isbell's admonition not to take any patient information with her after she stopped working for ALT, Trost used ALT's patient lists to solicit business for Bella Tu. Given that Trost is an officer and fifty percent owner of Bella Tu, her actions are properly imputed to the company.

Trost's various arguments to the contrary are without merit. ALT, not Trost, owned the lists. Trost's assertion that a professional service corporation cannot have patients is at odds with the Professional Service Corporation Act, as discussed above. Trost acknowledged that she never owned any shares in the company and that she created the patient lists and used them in her capacity as ALT's employee. Trost further acknowledged that "as a registered nurse, I work under the supervision of a physician" and that she does so "at all times." To the extent that any of the individuals who received treatment at ALT considered themselves to be Trost's patients, they were so only as a result of Trost's status as an ALT employee. Moreover, no support exists for Trost's claim that she had a professional responsibility to inform ALT's patients of her new whereabouts. Finally, she should have raised any concern about false advertising to the appropriate administrative disciplinary authority pursuant to the procedures in RCW 18.130.080. No authority justified Trost's resort to self-help. Accordingly, the trial court properly granted summary judgment against Trost and Bella Tu on this claim.

IV

Warner separately contends that the trial court erred by holding him individually liable for misappropriation of ALT's trade secrets. We agree.

Again, in reviewing an order granting summary judgment, we sit in the same capacity as the trial court with respect to the evidence. A party may move

for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 21, 851 P.2d 689 (1993). The moving party bears the initial burden of showing that there is no genuine issue of material fact. Green v. A.P.C., 136 Wn.2d 87, 99, 960 P.2d 912 (1998).

A de novo review of the record reveals that ALT failed to carry its initial burden on its misappropriation claim against Warner individually. To begin with, ALT did not allege facts in its complaint that support a misappropriation claim against Warner individually. ALT referred to Warner only as Trost's husband and alleged that "[a]ll actions taken by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner." ALT's brief in support of its motion for summary judgment did not address Warner's conduct. No evidentiary support for the claim is present in the record. On appeal, to support its judgment against Warner individually, ALT points to Dr. Isbell's comment to Warner concerning the patient form templates constituting ALT's property. However, this statement does not establish Warner's individual liability for misappropriation of ALT's trade secrets. Warner did not work for ALT. There is no allegation that he personally used ALT's patient lists to solicit business. At most, Dr. Isbell's statement establishes that he had a conversation with Warner about Trost's actions.

ALT now also argues that it was entitled to summary judgment because

Warner did not actively contest his personal liability in the trial court, even though he was named as an individual defendant in ALT's counterclaim. Be that as it may, Warner's silence does not establish his personal liability. Pursuant to CR 56(c), ALT had the burden to establish Warner's individual liability. It failed to do so. In the absence of any evidence of Warner's personal wrongdoing, it was improper for the trial court to grant summary judgment on the issue of Warner's individual liability. Therefore, reversal is required.[4]

V

Trost next contends that the trial court erred by admitting the testimony of ALT's expert witness on damages while also limiting the scope of her economic experts' testimony. Once again, we disagree.

A trial court's ruling on the admissibility and scope of expert testimony is reviewed for abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Pursuant to King County Local Rule (KCLR) 26(b), parties must disclose primary and rebuttal witnesses according to the case management schedule set for the case. As regards expert witnesses, the disclosure must include a "summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications." KCLR 26(b)(3)(C). "Any person not disclosed in compliance with this rule may not be

[4] We decline to order dismissal of ALT's individual claims against Warner or to order the judgment amended so as to reach only Warner's share of his and Trost's community property. Having prevailed against Warner individually in its motion for summary judgment, it was reasonable for ALT not to introduce evidence against Warner individually at trial. Warner did not seek summary judgment dismissal of the claims against him individually. Accordingly, we remand the case for further proceedings.

called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLR 26(b)(4).

There was good cause for ALT's delay in producing the report of its economic expert: Trost's repeated failure to produce requested documents. As the trial court observed, ALT's delay in filing its expert report was attributable to Trost's dilatory conduct. The trial court did not abuse its discretion in admitting the testimony of ALT's expert witness.

With respect to the trial court's ruling on Trost's economic experts' testimony, the record establishes that Trost stipulated to the limitations that the court imposed on their expected testimony.[5] Accordingly, she waived the ability to raise this issue on appeal.[6] RAP 2.5(a).

VI

Next, Trost contends that the jury's award of damages to ALT—$305,000 in future lost profits and $119,000 for unjust enrichment resulting from Trost's use of ALT's patient list—is not supported by substantial evidence. She is wrong.

We will not overturn a jury verdict unless the verdict is outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to result from passion or prejudice. Washburn v. Beatt Equip. Co., 120

[5] The trial court specified that its written order excluding the testimony of Trost's expert witnesses as experts was "based on agreement [that they] are fact witnesses."

[6] Even if the trial court had excluded these witnesses, as Trost contends, it would not have abused its discretion in doing so because Trost never submitted an expert report for either witness.

Wn.2d 246, 268–69, 840 P.2d 860 (1992) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835-37, 699 P.2d 1230 (1985)). Substantial evidence is evidence sufficient to "'convince an unprejudiced, thinking mind.'" Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (internal quotation marks omitted) (quoting Indus. Indem. Co. of N.W., Inc. v. Kallevig, 114 Wn.2d 907, 916, 792 P.2d 520 (1990)).

With respect to the jury's award of future lost profits, Dr. Isbell testified that ALT stood to earn $500,000 in profits over the five-year period following Trost's misuse of ALT's patient lists. Trost does not dispute that five years into the future is the relevant timeframe for the calculation of future lost profits. ALT's economic expert, Michelle Swanson, testified that, based on six years' worth of ALT's financial records, ALT stood to earn $650,000 in profits through 2009. Because Swanson's estimates were based on profit history, they were not speculative. See Larsen v. Walton Plywood Co., 65 Wn.2d 1, 15–17, 390 P.2d 677, 396 P.2d 879 (1964). Further, Bella Tu's business manager, Dorene Harrison, confirmed in her testimony at trial that the 145 former ALT patients who switched to Bella Tu after receiving Trost's emails would have accounted for $362,500 in revenue.[7] Therefore, the jury's award of $305,000 for future lost

[7] On cross-examination, Harrison testified as follows:

> Q. Go with me for a second. If each patient from Aesthetic Litetouch did yield 2,500 in dollars in revenues, if my arithmetic is right, that's $362,500, does that look about right?
>
> . . .

profits was within the range of the evidence introduced at trial.

With respect to the jury's award of $119,000 on ALT's claim for unjust enrichment, Trost contends that this amount is based on evidence only of Bella Tu's gross revenues, not it profits. The general rule is that "[a] person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity." Cox v. O'Brien, __ Wn. App. __, 206 P.3d 682, 688 (2009) (citing Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042 (2008)). Thus, the proper remedy is to disgorge wrongfully obtained profits. Staff Builders Home Healthcare, Inc. v. Whitlock, 108 Wn. App. 928, 932–33, 33 P.3d 424 (2001). The jury's award appears to be derived from Harrison's testimony that Bella Tu received $119,000 in revenue from the 145 former ALT patients it treated in the first 16 months after Trost began working for Bella Tu.[8] Thus, the jury's award was not speculative. There is no indication that Trost sought to clarify at trial whether these revenues reflected gross earnings or profits. Nor did Trost object to the trial court's jury instructions on ALT's claim for unjust enrichment. Without providing any evidence of a contrary amount and in the absence of any objection to the court's instructions to the jury, Trost cannot now properly seek vacation of the jury's

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A. Yes.

Report of Proceedings (Jan. 28, 2008) at 52.

[8] Trost also admitted during discovery that between September 2005 and January 2007, 145 of ALT's former patients obtained treatment at Bella Tu, generating revenues of at least $119,210. Trost did not specify in her discovery response whether this figure represents profit or gross revenue.

verdict.

VII

Trost further contends that the trial court erred by declining to increase the amount of damages that it awarded to her on her claim that ALT infringed her right of publicity. Again, she is incorrect.

Pursuant to RCW 63.60.060(2), which provides a statutory cause of action for violation of one's publicity and personality rights,

> [a]ny person who infringes the rights under this chapter shall be liable for the greater of [$1,500] or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages. To prove profits under this section, the injured party or parties must submit proof of gross revenues attributable to the infringement, and the infringing party is required to prove his or her deductible expenses.

Although the jury found that ALT infringed Trost's rights under chapter 63.60 RCW, it did not find that Trost suffered any injury as a result of ALT's reference to her in its advertisements. Consistent with RCW 63.60.060(2)'s mandate, the trial court determined that there were nine instances in which ALT infringed Trost's right of publicity. It awarded $1,500 for each instance but declined to award additional damages, citing the jury's verdict.

Trost argues that the trial court should have awarded additional damages to her because the statute does not preclude recovery of damages just because a jury finds that the plaintiff has not suffered any injury. However, Trost approved of the instruction and verdict form that the trial court gave to the jury

regarding the calculation of any award for damages. In her present argument, she also ignores the statutory requirement that she, as the claimant, had the burden to "submit proof of gross revenues attributable to the infringement." RCW 63.60.060(2). She points to nothing in the record that establishes her right to recover damages greater than the statutory amount. Nor does our independent review of the record reveal any such evidence. The trial court did not err.

VIII

Trost's final contention is that the trial court erred in calculating the amount of damages that she was owed for unpaid commissions during her tenure with ALT. We agree.

It is unlawful for an employer to willfully withhold wages that it is obligated to pay an employee. RCW 49.52.050. An employer who does so shall be liable to the aggrieved employee "for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages." RCW 49.52.070. Thus, "[t]he critical determination in a case [for exemplary damages] is whether the employer's failure to pay wages was 'willful.'" Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998). "Ordinarily, the issue of whether an employer acts 'willfully' for purposes of RCW 49.52.070 is a question of fact." Schilling, 136 Wn.2d at 160 (citing Pope v. Univ. of Wash., 121 Wn.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993)).

The trial court specifically found that Dr. Isbell had promised to pay Trost 15 percent of monthly profits. The trial court further found that, according to ALT's tax returns, the practice generated the following income: $15,297 in 2000; $39,392 in 2002; $59,352 in 2003, and $109,787 in 2004.[9] However, the trial court concluded that Trost "is entitled to 10 [percent] of the net profit in 2000 ($3,935.20), and 15 [percent] of the profits made in 2003 and 2004 ($13,311)," for a total award of $17,246.20 to be offset against ATL's damages. It is unclear how the trial court calculated this award in light of its findings. Further, the trial court did not make a finding as to whether ALT's failure to pay Trost a commission was willful. That the parties stipulated to a bench trial on this claim after the jury trial on the other claims does not absolve ALT from liability for exemplary damages. Accordingly, we reverse the trial court's award of damages and remand for a finding as to whether ALT's failure to pay a commission for net profits was willful and for a recalculation of damages.

IX

ALT requests an award of attorney fees on appeal for the continued litigation of its misappropriation claim. When there is a finding in the trial court that willful and malicious misappropriation exists, the prevailing party may recover attorney fees in the trial court and on appeal. RCW 19.108.040; Thola v. Henschell, 140 Wn. App. 70, 90, 164 P.3d 524 (2007) (citing RCW

[9] The tax returns for 1999, 2001, 2005, and 2006 reflect that ALT operated at a loss in each of these years. Trost does not contend otherwise.

19.108.040; Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 668, 935 P.2d 555 (1997)). The jury so found, and the trial court awarded ALT attorney fees. Accordingly, ALT is entitled to an award of attorney fees on appeal, and it may file a subsequent motion for the entry of such an award.[10]

Affirmed in part. Reversed and remanded in part.

Dwyer, A.C.J.

We concur:

Grau, J.

Cox, J.

[10] Trost, Bella Tu, and Warner made no request for an award of attorney fees on appeal.